IN THE

Supreme Court of the United States

OCTOBER TERM, 1959 No. 873

James A. Gainey and J. L. Young, Individually and on Behalf of Others Similarly Affected,

Petitioners,

v.

Pennsylvania System Board of Adjustment, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees

and

The Pennsylvania Railroad Company,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF RESPONDENT, PENNSYLVANIA SYSTEM BOARD OF ADJUSTMENT, BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

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BRIEF FOR RESPONDENT BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

1. Does "the peg upon which the plaintiffs hang their case" (a letter from a Brotherhood Officer to a Railroad

Officer) constitute a collective bargain within the meaning of the Railway Labor Act?

(discussed in Pennsylvania Railroad brief)

2. If there was a collective bargain within the meaning of the Railway Labor Act, does jurisdiction to award damages for alleged breach of the collective bargain reside exclusively in the National Railroad Adjustment Board?

(discussed in Pennsylvania Railroad brief)

3. If there was no collective bargain within the meaning of the Railway Labor Act, does the Court have jurisdiction to award damages against the railroad and against the Brotherhood for failure to make such a collective bargain?

(discussed in this brief)

4. Is this suit barred by plaintiffs' failure to utilize their remedies within this union?

(discussed in this brief)

STATEMENT OF THE CASE.

This Respondent adopts as its statement of the case, the first two paragraphs of Judge Goodrich's Opinion, found at pages 32 and 33 of the Appendix to the Petition, and at 275 F 2d 342, p. 343.

ARGUMENT.

The matter of the tallymen's pay (the wage differential between the Philadelphia and Pittsburgh areas, and the abolition of the incentive or tonnage pay when the only station at which it was paid was closed up) has

already been before the Pennsylvania Courts, *Grand Lodge* v. *Girard Lodge*, 384 Pa. 248, 120 A 2d 523. cert. den. 351 U. S. 985. It was pleaded in the counterclaim as a "derelict failure to act of the Brotherhood," evidence was taken (Appendix to Petition 73-75), the counterclaim dismissed and the dismissal affirmed by the Supreme Court of Pennsylvania, *Grand Lodge* v. *Girard Lodge*, *supra*, at page 268. In that case, as Judge Lord points out (App. p. 19) the main issue was seniority rights at Butler Street Station, and the tallymen's pay was only secondary. Petitioners are urging the same reasons now as then, why this Court should take jurisdiction, to wit, by analogy to *Steele* v. *L. & N. R. R.*, 323 U. S. 192. There is even less reason why this Court should now take jurisdiction than when the matter was last presented to it.

The main reasons, stated by the Court of Appeals, for dismissing the Complaint were (1) that the letter alleged to be a collective bargain ("the peg upon which the plaintiffs hang their case" as Judge Goodrich calls it) was not a contract of any kind, and (2) that plaintiffs did not go to the National Labor Relations Board. These points are discussed in the Pennsylvania Railroad's brief which obviates the need for repetition here.

The ground of dismissal peculiar to the Brotherhood was that plaintiffs have failed to allege exhaustion of their remedies within the union or an adequate reason for failure to do so. This made it unnecessary to decide whether plaintiffs had stated a cause of action under the Railway Labor Act and of the line of cases stemming from *Steele* v. *Louisville & N. R. R.*, 323 U. S. 192, and whether the dismissal of the counterclaim based upon the same transactions by the Pennsylvania Courts in *Grand Lodge* v. *Girard Lodge*, *supra*, made the issue technically *res judicata*.

EXHAUSTION OF REMEDIES WITHIN THE UNION.

The Petition states (p. 10) "that their pleas for help *addressed to the union* went unheeded for ten years." (emphasis added). The averment in the Complaint, however, is

> "The plaintiffs have no remedy within the Brotherhood since this *complaint against the Pennsylvania Railroad Company* has gone unheeded by all echelons of the Brotherhood since 1951." (Appendix pp. 48-49, emphasis added.)

The difference is significant. Plaintiffs have not alleged that they even *initiated* Brotherhood procedures, far less that they *exhausted* them. The plaintiffs are averring a reason for failure to use union procedures at all. The reason is quite inadequate, in no wise averring that a proper complaint under normal union procedures would have been ignored.

Plaintiffs belatedly (*i. e.* after the Court of Appeals decision) offer to amend their Complaint. The amendment seeks to tie this controversy into the quarrel between Joseph P. Zawada and his superior officers in the union (Pet. App. 63-64, 67-68, 73-75). This quarrel was the subject matter of *Grand Lodge* v. *Girard Lodge*, 384 Pa. 248 (cert. denied, 351 U. S. 985), and *Zawada* v. *Pennsylvania System Board of Adjustment*, 392 Pa. 207 (cert. denied 358 U. S. 829). In these cases, and also in *Fagan* v. *Pennsylvania Railroad*, 172 F. Supp. 465, 474, the courts have already examined the procedures of this Brotherhood and have found them fair.

Petitioners cite the legislative policy laid down in the new Labor Management Reporting & Disclosure Act of 1959, Public Law 86-257, 73 Stat. 519, Section 10(a) (4). This policy sustains our position, for it reiterates that dissatisfied members must first exercise their rights within

the union. The four month limitation on union procedures contained in the Act has no relevance to members who do not even initiate proceedings.

ALLEGED DISCRIMINATION—THE RULE OF THE STEELE CASE.

Petitioners also seek to bring this case within the rule of *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192. The cases are obviously different. In *Steele* the unions sought to make a collective bargain with "discriminations based on race alone" which "are obviously irrelevant and invidious" (p. 203). This Court recognized that variations *relevant* to the contract are within the scope of the bargaining representation of a craft, and that the contracts might have unfavorable effects on some of the members of the craft, not all of whom are identical in their interest.

This principle was spelled out more explicitly in *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, in which the collective bargain favored employees whose military service preceded employment by Ford as compared to those whose employment by Ford preceded their military service. In approving such a discrimination this Court said (p. 338):

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
>
> Compromises on a temporary basis, with a view

to long-range advantages, are natural incidents of negotiation."

Just such a case is the case at Bar. A geographical discrimination is averred between the wages of tallymen on the Eastern and Central Division of the Railroad. The dispute also concerns a type of incentive pay known as tonnage rates which were formerly paid at one freight station in Philadelphia. Surely there is nothing invidious about relating the rates of railway workers' pay to the rates of pay of other workers in the area, nor in restricting incentive pay to the operations where such a system is practicable and effective—in this case to a single station handling a large volume of freight.

The essence of the complaint will be found in the prayer for relief (Appendix, p. 51). Plaintiffs ask from the Railroad an increase in the pay of tallymen retroactive to 1951, and punitive damages against the Brotherhood for its failure to have gotten this increase. The group alleged to be discriminated against are identified only by the nature and the place of their labor. There is no suggestion of race discrimination or discrimination based on any other irrelevant or invidious matters. This is a far cry from the *Steele* case. The object of the Railway Labor Act is to bring peace, not war, to the Railroad industry. *Union Pacific Railroad Company* v. *Price*, 360 U. S. 601, 609; *Pennsylvania Railroad* v. *Day*, 360 U. S. 548, 553-554. The rule asked by this plaintiff would require the courts to review the exercise of judgment by thousands of union representatives in ten thousand issues of collective bargaining. It would extend the racial discrimination cases to every conflict of personalities among the union officers.

CONCLUSION.

Respondent Brotherhood of Railway and Steamship Clerks, etc. asks that the petition for certiorari be denied.

Respectfully submitted,

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